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In the Supreme Court of the United States

OCTOBER TERM, 2000

No. 00-1017

BECKMAN INSTRUMENTS, INC. and SYSTEMS MANAGEMENT SPECIALISTS, INC.,
Petitioners

v.

CINCOM SYSTEMS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does Section 117(c) of Title 17 implicitly create a right to make an unauthorized copy of a computer program for purposes beyond maintenance or repair of the computer on which the computer program is installed?

PARTIES TO THE PROCEEDING, CORPORATE PARTIES, PARENT COMPANIES AND SUBSIDIARIES

[Rule 29.6, Rules of the United States Supreme Court]

There are no parent corporations or subsidiaries the disclosure of which would be required under Rule 29.6 of the Rules of the United States Supreme Court. The parties to the proceeding – all corporate parties – are identified on the cover of this Petition.

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BRIEF IN OPPOSITION

The present Petition for a Writ of Certiorari does not provide even a hint of the "compelling reasons" required for certiorari under Supreme Court Rule 10. The petition requests review of an unpublished decision of the United States Court of Appeals for the Ninth Circuit. There is no indication that the decision below in any way conflicts with a decision of this Court, another United States Court of Appeals, or the highest court of any state. There is no indication that the Court of Appeals

below in any way "departed from the accepted and usual course of judicial proceedings."

Petitioners' sole substantive argument – that a 1998 Amendment to the Copyright Act renders the precedent relied on below somehow "questionable" or "problematic" – is based upon improper statutory construction. Petitioners acknowledge that the 1998 Amendment "does not deal with the precise situation presented by the case at bar." Pet. 6. Instead, they argue that the amendment, which provided an exception specifically limited to copying software for "purposes only of maintenance or repair" (17 U.S.C. § 117(c)) should be expanded to include copying for any other "non-competitive usage." Pet. 6.

It is hard to imagine how Congress could have been clearer about its intent. It limited the statutory exception to "*only* maintenance or repair." 17 U.S.C. § 117(c) (emphasis added). Instead of implying a Congressional intent to broaden the coverage of the exception, the language of the statute demonstrates a Congressional intent to expressly limit the statutory exception. Therefore, the decision below does not raise an important question of federal law that should be decided by this Court.

STATEMENT OF RELEVANT FACTS

Respondent Cincom Systems, Inc. ("Cincom") licensed certain software to Petitioner Beckman Instruments, Inc. ("Beckman"). This license was a simple software license, not a license of a "computer software system" as suggested by Petitioners. The license agreement granted Beckman, and only Beckman, a nontransferable license to use the Cincom software, and expressly prohibited Beckman from "selling, giving or leasing" the Cincom software to any third party. Beckman used the Cincom software for various business

purposes, including forming the backbone of its order processing system.

After using the Cincom software for a period of time, Beckman entered into an "outsourcing" agreement with Petitioner Systems Management Specialist, Inc. ("SMS"). Under that agreement, Beckman sold its data processing facility and computers to SMS and also transferred, without Cincom's permission, all of the Cincom software to SMS. SMS proceeded, without Cincom's permission, to use Cincom's software to provide data processing services. In providing such services, SMS repeatedly copied the Cincom software. Such copying included: (a) making the electronic copies of the Cincom software in the random access memory ("RAM") of the computer's central processing unit ("CPU") each time that the Cincom software was run; (b) opening and closing the Cincom database system, which caused copies of the program to be made in RAM; (c) making back-up copies of the Cincom software on back-up media; and (d) defragmenting the hard disk drives, which created electronic copies.

ARGUMENT

This is a simple case of copyright infringement. Petitioner SMS copied the Cincom software without a license. The principal argument in the courts below centered on the operation of the license agreement between Beckman and Cincom. The Court of Appeals correctly decided that this license agreement did not authorize the copying of the Cincom software by SMS. The Petition for Writ of Certiorari does not challenge that aspect of the decision below.

Instead, the present Petition focuses on a 1998 Amendment to the Copyright Act, and in particular Section 117(c) of Title 17. The Court of Appeals below considered the 1998 Amendment to the Copyright Act, and concluded that the claims in this case "extend beyond the limited copying permitted under the Act."

Pet. 17a. Petitioners even acknowledge that the Act "does not deal with the precise situation presented by the case at bar." Pet. 6. Normally, this would end the inquiry.

Petitioners, however, suggest a fanciful judicial expansion of the statute to cover the case at bar. Fairly stated, Petitioners argue that the 1998 Amendment providing a limited right to copy software "for purposes only of maintenance or repair" somehow demonstrates a broad Congressional to allow copying of software for any non-competitive use. This convoluted interpretation of the statute simply does not rise to a level deserving review on certiorari.

I.

THE 1998 AMENDMENT TO THE COPYRIGHT ACT SHOULD NOT BE JUDICIALLY EXPANDED

Petitioners contend that Section 117(c) of Title 17 was added in 1998 to legislatively override the 1993 decision in *MAI Systems Corp. v. Peak Computer*, 991 F.2d 511 (9th Cir. 1993). That case held that:

> a "copying" for purposes of copyright law occurs when a computer program is transferred from a permanent storage device to a computer's RAM.

Id. at 518.

To evaluate Petitioners' argument about the Congressional intent to override *MAI Systems Corp. v. Peak Computer, Inc., supra.*, it is crucial to look at the language chosen by Congress. In spite of the broad precedent quoted above, Congress chose to provide only a very narrow exception, expressly and explicitly limited to "making a copy of a computer program . . . for purposes *only* of maintenance or repair." 17 U.S.C. § 117(c) (emphasis added).

When Congress amends a statute to overrule a particular case, it is obviously appropriate to assume that Congress was aware of the holding of that case. *Lorillard v. Pons*, 434 U.S. 575, 580-83, 98 S. Ct. 866, 870-71, 55 L. Ed.2d 40 (1978). Since Congress provided only a very limited statutory exception to the *MAI Systems Corp.* decision, the correct inference is that Congress did *not* intend to overrule the remainder of that decision. *Id.* This is especially true since Congress used the limiting word "only" in describing the statutory exception. *See, e.g., Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 109, 100 S. Ct. 2051, 2056, 64 L. Ed. 2d 766 (1980). Therefore, contrary to Petitioners' unsupported assumption, the 1998 Amendment to the Copyright Act evidence a clear Congressional intent to protect only maintenance and repairs, and to leave Petitioners' activities unprotected.

II.

THERE IS NO APPROPRIATE BASIS TO GRANT CERTIORARI.

In any event, there is no "compelling reason" to grant certiorari to the case at bar. All of the Court of Appeals decisions below are unpublished decisions, and are therefore not citable precedent. 9th Cir. R. 36-3. The Court of Appeals decisions below rely upon the 1993 decision in *MAI Systems Corp. v. Peak Computer, Inc., supra.*, and there has been no conflicting decision of another United States Court of Appeals or the highest court of any state over the last seven years that conflicts with *MAI Systems Corp.* There is no suggestion that the court below in any way departed from the accepted and usual course of judicial proceedings. There is certainly no conflict with a prior decision of this Court. There is simply no legitimate reason to grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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